

Message Text

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ACTION SS-25

INFO OCT-01 ISO-00 SSO-00 /026 W
-----072457 281919Z /41
O 281604Z JUN 78
FM AMEMBASSY SANTIAGO
TO SECSTATE WASHDC IMMEDIATE 9680
INFO AMEMBASSY BUENOS AIRES

C O N F I D E N T I A L SECTION 1 OF 2 SANTIAGO 4859

STADIS//////////

EXDIS

FOR ARA, D, P AND L ONLY

BUENOS AIRES FOR LEGAL ATTACHE

E.O. 11652: GDS
TAGS: PGOV SHUM CI
SUBJECT: LETELIER/MOFFITT ASSASSINATION INVESTIGATION -- PART II OF
ETCHEBERRY TRANSLATION OF GOC NOTE

REF: SANTIAGO 4856

THE SECOND HALF OF LAWYER ETCHEBERRY'S TRANSLATION OF A GOC
NOTE ON LETELIER CASE JUDICIAL COOPERATION FOLLOWS. THE
SPANISH ORIGINAL OF THE NOTE, DATED JUNE 23, WAS CARRIED TO
WASHINGTON THAT DAY BY AMBASSADOR LANDAU. IT TRANSMITS THE
TEXTS OF TWO LETTERS FROM AD HOC MILITARY PROSECUTOR GENERAL
HECTOR OROZCO TO ACTING FOREIGN MINISTER GENERAL ENRIQUE
VALDES (OF JUNE 16 AND JUNE 21). THE EMBASSY HAS MADE A FEW
MINOR CORRECTIONS AND COSMETIC CHANGES IN THE TRANSLATION
BUT HAS NOT ATTEMPTED TO MAKE ETCHEBERRY'S ENGLISH FULLY
IDIOMATIC. ADDRESSES, SALUTATIONS AND OTHER PROTOCOLAR
LANGUAGE ARE OMITTED.

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QUOTE:

THE TEXT AND SENSE OF THE NOTES REMITTED BY US TO THE CNI
WERE INTENDED TO OBTAIN A STRICT COMPLIANCE WITH THE REQUIRE-
ME
TS OF OUR CODE OF MILITARY JUSTICE AND THE CORRESPONDING

PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE IN THE MATTER OF EVIDENCE IN A CRIMINAL INVESTIGATION.

THERE IS A CENTURIES-OLD DIFFERENCE IN THIS FIELD BETWEEN THE CIVIL LAW AND THE COMMON LAW RULES. THE LATTER IS ESSENTIALLY CUSTOMARY AND ONLY TOOK FROM THE ROMAN LAW SOME POINTS RELATED TO NORMS ALREADY EXISTING IN THE PRAETORIAN LAW.

THEREFORE, OUR LEGAL FAMILY IS ESSENTIALLY CODIFIED AND THE PROCEDURAL ASPECTS ARE STRICTLY REGULATED AND ASSESSED, IN WHICH RESPECT THERE IS AN IMPORTANT DIFFERENCE WITH THE PROCEDURAL ASPECTS OF THE COMMON LAW: THE LATTER ARE LEFT MAINLY TO THE JUDGES' MINDS (SIC) WHO ARE THE JEALOUS GUARDIANS OF THIS BRANCH OF THE LAW.

AS FAR AS THE CHILEAN LAW IS CONCERNED, UNDER THE INFLUENCE OF THE OLD SPANISH LAWS (ALL OF THEM OF STRICT REGULATION), AND OF THE ESSENTIALLY POSITIVIST AND SPECIFIC INFLUENCE OF THE FRENCH LEGISLATION, A SYSTEM OF LEGAL REGULATIONS OF EVIDENCE WAS ADOPTED. ONLY AFTER THE FIRST QUARTER OF THE CURRENT CENTURY OUR LEGISLATION UNDERWENT THE INFLUENCE OF THE SO-CALLED SYSTEMS OF FREE ASSESSMENT OF THE EVIDENCE, BUT ONLY UNDER THE ASPECT OF THE "CONSCIENTIOUS ASSESSMENT OF EVIDENCE." THE LATTER HAS BEEN CONSIDERED BY OUR MILITARY COURTS, NOT AS AN EXCEPTION TO THE BASIC SYSTEM OF LEGAL REGULATION, BUT RATHER AS A COMPLEMENT THEREOF IN SUCH A WAY THAT SOME MEANS OF

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EVIDENCE MAY HAVE MORE WEIGHT THAN THEY USUALLY HAVE, AS WOULD BE THE CASE OF A SINGLE PIECE CIRCUMSTANTIAL EVIDENCE THAT IN SOME CASES COULD AMOUNT TO A FULL PROOF OF A CERTAIN FACT. ALL THIS IS UNDERSCORED BY THE TEXT OF ART. 194 OF THE CODE OF MILITARY JUSTICE, WHICH PROVIDES: "IN THE ASSESSMENT OF THE EVIDENCE, THE COURT WILL IN PRINCIPLE BE SUBJECT TO THE CORRESPONDING RULES OF PROCEDURE; HOWEVER, IT WILL BE ENTITLED TO ASSESS CONSCIENTIOUSLY THE PIECES OF EVIDENCE PRODUCED, WITH THE PURPOSE OF ESTABLISHING THE TRUTH ABOUT THE FACTS OF THE CASE."

THIS RULE BELONGS TO THE CRIMINAL PROCEDURE IN TIME OF WAR -- AS SOMEONE SAID, UNDER THE BATTLE TENT -- AND EVEN IN THOSE CIRCUMSTANCES IT SETS FORTH THE GENERAL PRINCIPLE OF ABIDING BY THE PROVISIONS REGULATING EVIDENCE, AND ONLY AS AN EXCEPTION IS PERMITTED THE "CONSCIENTIOUS" ASSESSMENT OF THE EVIDENCE.

THE PRECEDING CONSIDERATIONS BEING TAKEN AS A PREAMBLE, TITLE III OF THE CHILEAN CODE OF CRIMINAL PROCEDURE, ON "INVESTIGATION OF THE CRIME AND OF THE IDENTITY OF THE DELINQUENT", IN ITS TITLES I (HOMICIDE, ABORTION AND SUICIDE) AND IV (FORGERY)

SETS FORTH SEVERAL RULES, ALL OF THEM MANDATORY, THAT REQUIRE STRICT COMPLIANCE AND RESTRICTED CONSTRUCTION, CONCERNING THE ASSESSMENT OF THE PIECES OF EVIDENCE GATHERED DURING THE INQUEST WITH REGARD TO THE ABOVE MENTIONED OFFENCES: "DIRECT EXAMINATION, AUTOPSIES, INSPECTIONS, IDENTIFICATIONS, EYE WITNESSES, MEDICAL REPORTS INDICATING THE PRECISE CAUSE OF DEATH; ATTESTATION AND CERTIFICATION OF DOCUMENTS; ACTS LEAVING TESTIMONY OF THE PHYSICAL CONDITION OF THE LATTER; COMPARISON, EXPERT OPINION, MANNER TO REPRODUCE DOCUMENTS BEFORE THE COURT, HANDWRITING TESTS AND OTHER EXPERT'S REPORTS, AS WELL AS THE NEED TO PROVE THE EXISTENCE OF THE FORGED DOCUMENT".

ALL THIS IS CORROBORATED BY BOOK II, FIRST PART, TITLE III, NO. 4 OF THE SAME CODE, THAT IN THE MATTER OF ADMISSIBILITY
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AS EVIDENCE IN TRIAL OF PUBLIC DOCUMENTS PROVIDES:

"ART. 184 - REQUIREMENTS FOR THE ADMISSIBILITY AS EVIDENCE
IN TRIAL OF PUBLIC DOCUMENTS:

1. THE ADVERSE PARTY MUST HAVE THE OPPORTUNITY TO EXAMINE THEM, AND TO ASK FOR A COMPARISON THEREOF WITH THE ORIGINAL DOCUMENTS, IF THE FORMER ARE COPIES;
2. THE ATTESTATION OF CERTIFICATION OF THEIR GENUINENESS MUST BE DONE BY THE OFFICER IN CHARGE OF THE OFFICIAL REGISTER IN WHICH THE ORIGINAL DOCUMENTS ARE RECORDED, OR BY THE SECRETARY OF THE COURT, AND
3. IF ONLY EXCERPTS OF A DOCUMENT ARE PRESENTED, THE ADVERSE PARTY AND THE COURT EX-OFFICIO ARE ENTITLED TO REQUIRE THE PRESENTATION OF THE COMPLETE TEXT OF THE FORMER.

"ART. 186 - DOCUMENTS DRAFTED IN A LANGUAGE OTHER THAN SPANISH PRODUCED IN COURT BY THE PARTIES MUST BE ACCOMPANIED BY THE CORRESPONDING TRANSLATION THEREOF.

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TO SECSTATE WASHDC IMMEDIATE 9681

INFO AMEMBASSY BUENOS AIRES

C O N F I D E N T I A L SECTION 2 OF 2 SANTIAGO 4859

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FOR ARA, D, P AND L ONLY.

BUENOS AIRES FOR LEGAL ATTACHE

THE COURT, EX-OFFICIO OR AT THE REQUEST OF ONE OF THE
PARTIES, MAY ORDER THE TRANSLATION TO BE REVISED BY AN OFFICIAL
TRANSLATOR APPOINTED BY THE COURT.

IF A DOCUMENT IS PRODUCED BY THE COURT, NOT BY A PARTY
TO THE SUIT, AND IS DRAFTED IN A FOREIGN LANGUAGE, IT MUST BE
TRANSLATED BY AN OFFICIAL TRANSLATOR AND BOTH THE ORIGINAL
DOCUMENT AND THE TRANSLATION WILL BE INCLUDED IN THE RECORD.

PUBLIC DEEDS EXECUTED ABROAD MUST BE LEGALISED IN THE
MANNER PROVIDED FOR IN ART. 345 OF THE CODE OF CIVIL PROCEDURE.

"ART. 187 - PRIVATE DOCUMENTS MUST BE RECOGNIZED AS TO
THEIR GENUINENESS BY THE PERSONS THAT HAVE WRITTEN OR SIGNED
THEM. THIS RECOGNITION WILL BE DONE UNDER THE FORM OF A
CONFESSION, IF THE DOCUMENT IS SIGNED BY ONE OF THE PARTIES,
OR OF A WITNESS TESTIMONY, IF IT HAS BEEN WRITTEN OR SIGNED
BY ANOTHER PERSON.

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HOWEVER, IF THE PROSECUTION BELIEVES THAT THE EXHIBITION
OF SUCH DOCUMENTS TO THE SIGNATORIES COULD FRUSTRATE THE
SUCCESS OF THE INVESTIGATION, THE GENUINENESS OF SUCH DOCUMENTS
MAY BE PROVISIONALLY ESTABLISHED THROUGH THE DEPOSITION OF
WITNESSES THAT ARE ACQUAINTED WITH THE HANDWRITING OR THE SIGNATURE
OF THE PRESUMED SIGNATORIES;

"ART. 188 - IF THE AUTHENTICITY OF A PRIVATE DOCUMENT IS
CHALLENGED OR CONSIDERED DUBIOUS, THE COURT SHALL APPOINT TWO
EXPERTS TO COMPARE THE HANDWRITING OR SIGNATURE OF THE DOCUMENT
WITH ANOTHER ONE ADMITTEDLY WRITTEN OR SIGNED BY THE PRESUMED

AUTHOR OF THE FORMER.

AS TO THE ATTESTATION OF CERTAIN WITNESSES NOW RESIDING IN THE TERRITORY OF THE U.S., IT HAS NOT BEEN POSSIBLE TO SEND LETTERS ROGATORY, AS PROVIDED IN ART. 199 OF THE CODE OF CRIMINAL PROCEDURE, FOR THIS COURT IS AWARE OF THE EXISTENCE OF A GOVERNMENT-TO-GOVERNMENT AGREEMENT ON THIS MATTER AND PARTICULARLY WITH REGARD TO THE FACTS CURRENTLY UNDER INVESTIGATION.

ALL THE PROCEEDING REQUIREMENTS ARE REGULATED BY THE PROVISIONS OF ARTS. 451 TO 457, IN GENERAL, AND ARTS. 477 THROUGH 480 OF OUR CODE OF PROCEDURE, IN PARTICULAR, AS TO THE ASSESSMENT AND WEIGHT OF THE EVIDENCE IN THE FINAL VERDICT AND SENTENCE.

IN THIS CONNECTION, IT MUST BE BORNE IN MIND THAT THE REQUIREMENTS OF OUR LAW IN A PARTICULAR FIELD HAVE TO BE CONSIDERED IN THE LARGER CONTEXT OF THE WHOLE LEGAL SYSTEM. THEREFORE, IF NO ADEQUATE PROVISION IS FOUND IN THE PARTICULAR SET OF RULES CONCERNING EVIDENCE IN A TRIAL BEFORE A MILITARY

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COURT, THE ABSENCE OF SUCH RULES OBLIGES RESORT TO THE GENERAL RULES GOVERNING EVIDENCE IN OTHER FIELDS, AND NOT TO THE PROVISIONS REGULATING EVIDENCE IN A FOREIGN LAW.

AS A CONSEQUENCE, A MEANS OF PROOF THAT IN AMERICAN LAW MIGHT AMOUNT TO FULL EVIDENCE, INCOMPLETE EVIDENCE OR SIMPLE EVIDENCE WITHIN A SYSTEM OF GRADUAL EVIDENCE, MEASURABLE BETWEEN A PRESUMPTION AND A CLUE, WILL NEVER BE ACCEPTED AS FULL PROOF UNDER THE CHILEAN LAW IF IT DOES NOT COMPLY WITH THE FORMAL REQUIREMENTS OF THE LATTER.

THEREFORE, AND AS AN ABSOLUTE RULE, ALL EVIDENCE PRODUCED ABROAD WILL HAVE TO COMPLY WITH THE PROCEDURAL ASPECTS OF CHILEAN LAW. OTHERWISE, IT WILL BE CONSIDERED AS VOID, WITH THE LACK OF EVIDENCE RESULTING IN THE ACQUITTAL AND IMPUNITY OF THE ACCUSED.

FOR ALL THESE REASONS, THE UNDERSIGNING PROSECUTOR BEGS Y.E. TO REQUEST FROM THE AMERICAN AUTHORITIES TO SEND EVERY PIECE OF EVIDENCE TO THIS COURT DULY AUTHENTICATED AND LEGALISED IN SUCH A WAY AS TO BE VALID AS EVIDENCE IN COURT. FAILURE TO COMPLY WITH THOSE FORMALITIES WILL RESULT IN A FURTHER DELAY OF THE INQUEST. END QUOTE
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